No. 10-103

In the Supreme Court of the United States

ARCHSTONE MULTIFAMILY SERIES I TRUST and ARCHSTONE,

Petitioners,

v.

NILES BOLTON ASSOCIATES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

We explained in the petition that this case is a prime candidate for certiorari: It presents a deep conflict among the lower courts on an important question of federal preemption and involves an erroneous decision by the Fourth Circuit that could not only interfere with the effective enforcement of this nation's disability laws but also jeopardize the contractual rights of every entity whose business is governed even in part by a federal regulatory scheme. Respondent Niles Bolton's attempts to challenge each of these bases for certiorari fall flat, and thus this Court's review is warranted.

A. The Holding Below Exacerbates A Circuit Split Over When Federal Statutes Preempt State-Law Indemnification Remedies.

In our petition, we identified a circuit split over whether and when no-fault federal statutes preempt state-law indemnification remedies among parties jointly liable for a violation of that federal scheme. Pet. 12–24. Niles Bolton attempts to distract from this split by arguing that it is "unsound to look to different holdings among an amorphous selection of proclaimed 'no-fault' statutes and conclude that there is conflict in the circuits." Opp. 6–7. But the statutes cited in the petition are equivalent in all material respects, and they illustrate a real conflict among the circuits on an important and broadly applicable principle of preemption law.

1. Niles Bolton concedes that *Martin* v. *Gingerbread House, Inc.*, 977 F.2d 1405 (10th Cir. 1992), is

"consistent with the Fourth Circuit's holding here." Opp. 9.[1] Thus, on one side of the split, the Fourth and Tenth Circuits have held that no-fault federal statutes impliedly preempt state-law indemnification claims based upon the unsupported assumption that indemnification "diminishes [a party's] incentive to ensure compliance" with a "regulatory" law. Pet. App. 10a; see also *Martin*, 977 F.2d at 1407. And to the extent that the "Second, Fourth and Fifth Circuits have [also] found no state-law right of indemnification for employers held liable under the [Fair Labor Standards Act]," Opp. 9, that only serves to deepen the circuit split we identified with the Sixth, Eleventh, and Federal Circuits.

2. In stark contrast with the Fourth and Tenth Circuits, the Sixth Circuit has held that a necessary "predicate" to finding a state-law indemnification suit preempted "is that the party seeking indemnification is a 'wrongdoer'" under the purportedly preempting federal law. *Delay* v. *Rosenthal Collins Group, LLC*, 585 F.3d 1003, 1006 (6th Cir. 2009). Niles Bolton argues that the Sixth Circuit "reaches a different result simply because the salient facts are dissimilar," Opp. 10, but this argument rests on the faulty assumption that "Archstone is a wrongdoer," Opp. 12.

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[1] Although Niles Bolton asserts that the Tenth Circuit's "rejection of state-law indemnity claims arising under the FLSA [did] not turn on a characterization of that statute as 'no-fault,'" this is beside the point. Opp. 10. Niles Bolton does not deny—nor could it—that the FLSA is a no-fault statute, and thus even if the Tenth Circuit did not explicitly rely on this fact in reaching its decision, that court indisputably held that a no-fault statute impliedly preempts state-law indemnification claims *Martin*, 977 F.2d at 1407.

Niles Bolton's argument betrays its fundamental misunderstanding of the nature of the FHA and the ADA. Niles Bolton does not, and cannot, contest that the FHA and the ADA are strict liability statutes. Pet. 14. As such, neither statute requires that a defendant have acted negligently, recklessly, or deliberately wrongfully before imposing liability. *Ibid.* It is precisely the point, then, that Archstone need *not* be a wrongdoer to be held liable for violating either of the statutes. Indeed, a party subject to the statutes can be found liable for an identified violation even if it did everything within its power to comply. The owner of a covered property would be liable, for example, even if it hired a compliance specialist to check each and every aspect of its property. *Delay*—which holds that indemnification is preempted only when the violator of a federal law is a wrongdoer—is thus directly contrary to the Fourth Circuit's decision in this case—which holds that indemnification is preempted *regardless* whether the violator of a federal law is a wrongdoer.

3. Niles Bolton also misses the mark in its efforts to distinguish *Foley* v. *Luster*, 249 F.3d 1281 (11th Cir. 2001), and *Cover* v. *Hydramatic Packing Co.*, 83 F.3d 1390 (Fed. Cir. 1996), as cases that "concern statutes with much different goals than the FHA and ADA." Opp. 13. Indeed, Niles Bolton overlooks the fact that the purposes of the statutes at issue are functionally equivalent.

Under all of these statutes—the Copyright Act, the patent statutes, the FHA, and the ADA—"a suit for indemnity between defendants * * * is not an obstacle to congressional intent," because Congress's primary intention was to "protect [*plaintiffs*] in a comprehensive and uniform way." *Foley*, 249 F.3d at

1287 (emphasis added). Indeed, these statutes define obligations only as between plaintiffs and defendants, and once the plaintiffs have been made whole, by settlement or otherwise, the statute's goals have been met and the statutory scheme is "no longer in the picture." *Cover*, 83 F.3d at 1393. Because the FHA and the ADA are parallel in this regard to the Copyright Act and the patent laws, these decisions are flatly inconsistent with the decision below.

4. Finally, Niles Bolton is wrong to dismiss the relevance of *Engvall* v. *Soo Line R R Co*, 632 N.W.2d 560 (Minn. 2001). Opp. 16–17, because the case involves circumstances analytically indistinguishable from those at issue here. See Pet. 23. And to the extent that "other federal courts disagree that the case was correctly decided," Opp 17, this provides further evidence of the disagreement among the lower courts on the question presented.

* * * * *

In sum, this case presents a clear circuit conflict on overarching principles of federal preemption Niles Bolton fails in its efforts to disassemble the split, and certiorari accordingly should be granted.

B. Review Is Also Warranted Because The Decision Below Is Inconsistent With This Court's Conflict-Preemption Precedents And Is Clearly Incorrect.

As we demonstrated in the petition, the decision below is inconsistent with this Court's longstanding presumption against preemption and plainly incorrect Pet. 24–29. In response, Niles Bolton argues that the presumption against preemption does not apply, or alternatively that the presumption is over-

come. Opp. 18–28. These arguments are as unpersuasive as they are unsupported.

1. Niles Bolton is wrong to suggest that "[n]o presumption against preemption applies" here because the FHA and ADA fall within "'an area where there has been a history of significant federal presence.'" Opp. 19 (quoting *United States* v. *Locke*, 529 U.S. 89, 108 (2000)) Building codes offer a paradigmatic example of an exercise of historic state police powers. "[A]s a quintessential state function, building codes [generally] lie outside the province of federal authority." David E. Adelman & Kirstin H. Engel, *Reorienting State Climate Change Policies to Induce Technological Change*, 50 ARIZ. L. REV. 835, 875 (2008). Indeed, the FHA *itself* recognizes the historical role of states in this arena by expressly encouraging "[s]tates and units of local government to include in *their existing procedures* for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such dwellings" comply with federal requirements 42 U.S C. § 3604(f)(5)(C) (emphasis added).

Because building codes involve historic police powers of the state, and the FHA and ADA are novel extensions of the federal government into this historically state-controlled arena, Niles Bolton must concede that "this Court begins with the 'assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" Opp. 18–19 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U S. 218, 230 (1947)). Thus, the presumption against preemption controls, and Congress's "silence on [a conflict-preemption] issue, coupled with its certain

awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend" to preempt state-law claims. *Wyeth* v. *Levine*, 129 S. Ct. 1187, 1200 (2009).

Niles Bolton's efforts to distinguish *Wyeth* do not detract from the force of the presumption against preemption. In *Wyeth*, this Court recognized that the "Federal Government has regulated drug labeling for more than a century," but stressed that it relied on the "presumption because respect for the States as 'independent sovereigns in our federal system' leads us to assume that 'Congress does not cavalierly preempt state-law causes of action.'" *Id.* at 1195 n.3. The same principle applies with even more force here because building codes are traditionally the province of the state. Additionally, the fact that "*Wyeth* involves a situation where state law offers protections greater than those provided by federal law" is of no moment. Opp. 21. This Court's reasoning that "[i]f Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express preemption provision at some point during the [statute's] history," *Wyeth*, 129 S. Ct. at 1200, applies equally whether or not the state action enhances protections.[2]

The Fourth Circuit accordingly erred by ignoring this Court's recent conflict-preemption case law, and

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[2] In any event, allowing indemnification actions does not diminish the protections for first-party plaintiffs because an owner "who is aware of its liability for any ADA violations found on its premises has a strong incentive to monitor compliance on its property." *Botosan* v. *Paul McNally Realty*, 216 F.3d 827, 834 (9th Cir. 2000). See page 10–11, *infra*.

in particular the Court's analysis of congressional silence in *Wyeth*.

2. Niles Bolton is also wrong to suggest that the presumption against preemption is overcome here. Opp 23. It first argues that "both the FHA and ADA prescribe exclusive remedies and plainly do not contemplate such claims between co-defendants." *Ibid.* But Niles Bolton does not and cannot offer a shred of evidence that Congress thought about this issue or intended to preempt state-law indemnification actions. And under the presumption against preemption, congressional "silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend" to preempt state-law claims *Wyeth*, 129 S. Ct at 1200. Without any evidence of contrary congressional intent,[3] congressional silence simply is not enough.[4]

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[3] The absence of a statutory right of indemnification under the ADA and the FHA is no evidence of congressional intent to preempt state-law indemnification actions Courts have routinely held that state-law claims for indemnity are permissible, even in the absence of a federal right to indemnification See, *e.g.*, *Fireman's Fund Ins Co.* v *W. Nat'l Mut. Group*, 851 F Supp 1361, 1366 (D Minn. 1994), *United States* v *Paxton Landfill Corp* , No 84C8531, 1985 WL 4087 (N D Ill Nov. 25, 1985)

[4] Niles Bolton asserts on a related point that the identical standard governs whether there is an implied *federal* right to indemnification under the FHA and ADA as whether those federal statutes preempt *state-law* contractual rights to indemnity Opp 7 n 1. But there is a presumption *against* finding implied rights of action under federal law, *Nw. Airlines, Inc.* v *Transp. Workers Union*, 451 U S. 77, 94 (1981), whereas the presumption against preemption creates a strong presumption *in favor* of permitting state-law claims *Wyeth*, 129 S Ct. at 1200

3. Niles Bolton also disputes our explanation, Pet. 26–29, that Archstone's state-law indemnity claims are compatible with the purposes of the FHA and the ADA. Opp. 24–28. These arguments lack merit.

First, Niles Bolton attempts to distinguish *Meyer* v. *Holley*, 537 U.S. 280 (2003), and *Ellison* v. *Shell Oil Co.*, 882 F.2d 349 (9th Cir. 1989)—which establish that "when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules," *Meyer*, 537 U.S. at 285—on the ground that Archstone's liability to the first-party plaintiffs in this case was express and direct, not vicarious. But Niles Bolton cannot contest Archstone's characterization of the FHA and the ADA as strict liability statutes. Pet. 4, 7. Thus, Archstone may be liable, without regard to knowledge, intent, or negligence, merely because it owns properties that violate the ADA.[5] This result mirrors vicarious liability principles commonly applied under the FHA and the ADA. See *Rosen* v. *Montgomery County*, 121 F.3d 154, 157 n.3 (4th Cir. 1997) (finding that "liability may be imposed on a principal for the statutory violations of its agent" under the ADA); *Wash. Sports & Entm't, Inc.* v. *United Coastal Ins. Co.*, 7 F. Supp. 2d 1, 10 (D.D.C. 1998). Accordingly, Archstone's liability for those violations

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[5] Notably, Niles Bolton does not suggest that Archstone took affirmative steps to permit, encourage, or perpetuate the statutory violations. And to the extent that Niles Bolton suggests Archstone was contributorily negligent, see, *e.g.*, Opp. 25–26, that assertion pertains to the merits of Archstone's state-law indemnification claim and is not a basis for federal preemption.

may properly be characterized as vicarious, and *Meyer* and *Ellison*[6] are on point.

Second, Niles Bolton argues indemnity actions do not further the purposes of the FHA and the ADA because architects remain liable to first-party plaintiffs. Opp. 26–28. But as a practical matter, architects will likely escape liability under the court of appeals' decision because owners are the most expedient targets for litigation and plaintiffs "can have but one satisfaction for the same injury." *Sessions* v. *Johnson*, 95 U.S. 347, 348 (1877). And despite Niles Bolton's rhetoric to the contrary, Opp. 26, architects are self-evidently in a better position to ensure that designs comply with the FHA and the ADA than building owners; it thus seems exceedingly unlikely that Congress would have intended to allow an architect who caused statutory violations of the FHA or ADA to walk away from the accessibility violations it caused without paying even a dollar to remedy them. See, *e.g.*, *Baltimore Neighborhoods, Inc.* v. *Rommel Builders, Inc.*, 3 F. Supp. 2d 661, 664 (D. Md. 1998) (observing that "allowing [the] architect[] * * * to escape liability" would obstruct the purposes of the FHA).

C. The Issue Here Is Of Substantial Practical Importance.

In our petition, we established three reasons why this case presents a matter of exceptional importance. *First*, the decision below will discourage set-

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[6] Niles Bolton also attempts to distinguish *Ellison* on its facts, Opp. 26, but Niles Bolton cannot avoid the Ninth Circuit's holding that state-law claims among jointly liable parties are enforceable despite a non-delegable duty arising under the governing federal statute. See *Ellison*, 882 F.2d at 353

tlement and force owners and developers to litigate cases to the bitter end in order to obtain a judicial apportionment of liability. Pet. 29 *Second*, the decision below will jeopardize the continuing validity of the Department of Justice regulation that expressly permits owners and commercial tenants to contractually allocate responsibility for ensuring compliance with the ADA. Pet. 30 *Third*, the decision below by its very terms would invalidate insurance agreements that provide coverage for non-willful violations of federal law, because there is no plausible basis under the Fourth Circuit's reasoning for distinguishing insurance from other indemnity agreements. Pet. 31. Niles Bolton offers no response to the first and third points, and its response to the second point is simply incorrect.

The fundamental flaw in Niles Bolton's argument is the fallacy that Archstone is asking this Court to permit it to "'contract away liability'" under the ADA Opp. 29 (quoting *Botosan* v. *Paul McNally Realty*, 216 F.3d 827, 834 (9th Cir. 2000)). Archstone acknowledged its liability to the first-party plaintiffs and it resolved that liability by entering into a consent decree whereby it agreed to retrofit 71 properties and pay $1.4 million in damages. Pet App. 3a Rather than trying to contract away *liability*, Archstone seeks to enforce a contractual right to *indemnification*. This is precisely the type of contractual allocation of responsibility expressly endorsed by 28 C.F.R. § 36.201(b) and *Botosan*.

As the Technical Assistance Manual issued by the DOJ to assist with ADA compliance explains, "any allocation made in a lease or other contract is only effective as between the parties, and both [parties] remain fully liable for compliance with all pro-

visions of the ADA." Department of Justice, Technical Assistance Manual on the Americans With Disabilities Act § III-1.2000 (1993). Thus, "the landlord is a necessary party in an ADA action," but "[t]he landlord can in turn seek indemnification from the tenant pursuant to their lease agreement." *Botosan*, 216 F.3d at 834. Niles Bolton's attempts to distinguish the contractual indemnification provision in this case ring hollow because there is no plausible reason why an owner's indemnity claims against a tenant would be consistent with the ADA while that same owner's indemnity claim against an architect would create a conflict requiring preemption.[7]

Accordingly, review is warranted because the decision below constructively invalidates an important DOJ implementing regulation and undermines the enforceability of insurance contracts covering insured parties' vicarious liability for violations of federal statutes.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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[7] Niles Bolton's reliance on the "readily achievable" language in *Botosan* replicates the same fundamental flaw in analysis. Opp. 29-30. In *Botosan*, the court recognized that a contractual allocation of indemnification "aids in the enforcement of the Act," because an owner who is "aware of its liability for any ADA violations found on its premises has a strong incentive to monitor compliance on its property." 216 F.3d at 834. Thus, the decision did not turn on the whether the controlling legal standard required readily achievable accommodations, it turned on whether the plaintiffs would have recourse and whether the owners retained an incentive to comply.

Respectfully submitted.

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